

United States Senate

WASHINGTON, DC 20510

December 8, 1999

The Honorable David M. Walker
Comptroller General
United States General Accounting Office
441 G Street, NW
Washington, DC 20548

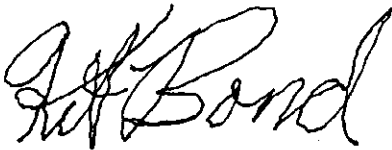
Dear Comptroller General Walker:

We are writing to request your opinion on a matter pertaining to the Pension Benefit Guaranty Corporation (PBGC). According to the attached opinion from the Comptroller General of the General Accounting Office responding to a request by the General Counsel of the PBGC dated October 7, 1986 "when serving in its trustee capacity, PBGC is treated as if it were a private fiduciary acting on behalf of the third party beneficiaries and possesses the same authority and duty to act as would a nongovernmental party if it were appointed to that position."

The Employee Retirement Income Security Act of 1974 imposes very specific fiduciary responsibilities regarding pension assets for entities sponsoring qualified pension plans. Each fiduciary of a pension plan must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." (29 USC §1105)

We are interested in knowing whether the PBGC, as a government corporation, is held to the same fiduciary standard as other entities covered by ERISA in protecting the non-limitation trust funds for the beneficiaries of the pension plans taken over by the PBGC?

We would appreciate receiving your response by January 3, 1999. If you have any questions please feel free to contact Lauren Fuller or Gina Falconio of the majority staff of the Special Committee on Aging at (202) 224- , or Cordell Smith of the majority staff of the Small Business Committee at (202) 224- . We will await your response.



Sincerely,



Christopher S. Bond
Chairman
Senate Small Business Committee

Charles E. Grassley
Chairman
Special Committee on Aging

attachment

*32689 B-223146

Matter of: Pension Benefit Guaranty
Corporation's Use of Contingent Fee
Arrangement With Outside Counsel

October 7, 1986

DIGEST

Pension Benefit Guaranty Corporation (PBGC), when serving as trustee for terminated pension plan, is authorized to exercise all powers possessed by private party when serving as trustee for pension plan and is not constrained by laws applicable to contracting by Federal agencies or expenditures from public funds. Therefore PBGC may modify existing contract and enter into a contingent fee contract with outside counsel for litigation services.

DECISION

This decision is in response to a request for an advance decision submitted by the General Counsel of the Pension Benefit Guaranty Corporation (PBGC) asking whether the PBGC is authorized to enter into a contingent fee arrangement with outside counsel for litigation against Navistar International Corporation (formerly International Harvester Company (IH)), Envirodyne Industries, Inc. (Envirodyne) and other defendants. As will be explained in more detail below, we find that the PBGC, when serving as trustee for terminated plans, is authorized to enter into the proposed agreement since it is not prohibited by law or public policy. We note that PBGC when serving as trustee is required to render an accounting related to its trust administration to a court and thus any fee charged by attorneys acting on behalf of the PBGC would be subject to judicial review (notwithstanding the contingent fee agreement) to determine its reasonableness under the circumstances.

BACKGROUND

The General Counsel of PBGC states in his submission that pursuant to provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301 et seq., on December 18, 1981 and November 12, 1982, the PBGC filed two suits in the Northern District of Illinois against IH, Envirodyne and other defendants seeking an order terminating two hourly and salaried pension plans of Wisconsin Steel (an IH subsidiary), establishing the date of plan termination; appointing

the PBGC as permanent trustee of the two pension plans; and establishing that as of the date of plan termination, defendants were, within the meaning of Title IV of ERISA, "employers" who maintained the plans. (FN1)

In the fall of 1984, the PBGC determined that the Wisconsin Steel litigation could be handled more effectively through the use of outside counsel, and, after seeking competitive bids from firms capable of handling such a large and complex case, retained a private law firm. The case has been vigorously pursued since that time.

However, because of the risk that PBGC might not prevail in the litigation and the high legal fees that it will continue to incur, (FN2) PBGC wishes to modify its fee arrangement with outside counsel.

If the PBGC does not ultimately prevail in the action or agree to a settlement, the total funds expended would be less under the proposed modified fee arrangement than under the existing contract. If the PBGC does prevail in the action or agrees to a settlement, PBGC would be required to pay the contractually stipulated contingent fee to the law firm. (FN3) This legal cost would, however, be paid out of the PBGC's trust funds (or by Navistar as part of any settlement). PBGC has advised that these funds consist of assets of pension plans for which PBGC has become trustee as well as "employer liability" collected under 29 U.S.C. § 1362 from employers who have failed to fund their pension plans properly. The money sought from IH in the litigation primarily consists of such "employer liability." Accordingly, the trust funds would be the beneficiary of any recovery in the Wisconsin Steel litigation.

DISCUSSION

PBGC is a nonprofit, wholly-owned Government corporation within the Department of Labor whose purpose is to insure that participants in private pension plans have guaranteed pension benefits should the plan under which they are covered terminate. See 29 U.S.C. § 100 et seq., 29 U.S.C. § 1302 and 31 U.S.C. § 9101(3)(I).

PBGC has two fundamentally different duties. On the one hand, PBGC serves in its corporate capacity as an insurer of the plans covered under the laws it administers. 29 U.S.C. § 1305. When acting in this capacity, its costs are financed through revolving

funds. 29 U.S.C. § 1305(b)(2)(D). When performing non-trust-related functions funded out of the revolving fund, PBGC is subject to provisions of law applicable to wholly-owned Government corporations unless it is specifically or by necessary implication exempted by law. See B-218441, August 8, 1985.

*32690 On the other hand, the law vests in PBGC the power to serve as trustee for terminated plans. 29 U.S.C. § 1342. When serving as trustee for a terminated plan, PBGC is serving primarily the interest of the pension participants and beneficiaries of the plan in the same manner and to the same degree as a nongovernmental party appointed to the same position. 29 U.S.C. § 1342(d)(1)(A)(i). For example, when serving as trustee, PBGC may require the transfer of all of the assets and records of the plan to itself as trustee, invest the assets in accordance with the provisions of the plan, and operate the plan so as not to increase its insurance liability. Furthermore, upon application and approval of the court, PBGC may pay plan benefits, collect amounts due the plan, litigate on behalf of the plan, liquidate plan assets and recapture prior payments. See 29 U.S.C. § 1342(d) generally for the powers of a trustee under ERISA. Appointment, retention and compensation of professional services contractors which include attorneys are to be done by trustees in accordance with PBGC regulations. 29 U.S.C. § 1342(h)(2). (FN4)

When serving in its trustee capacity, PBGC is treated as if it were a private fiduciary acting on behalf of the third party beneficiaries and possesses the same authority and duty to act as would a nongovernmental party if it were appointed to that position. Thus, the laws applicable to expenditure of appropriated funds by wholly-owned Government corporations do not apply to PBGC when it is acting in its trustee capacity and is funded out of trust funds transferred to it in order to perform the duties of a trustee under ERISA. In this regard, we have advised the House Select Committee on Aging of the House of Representatives that the PBGC is not bound by the provisions of the Federal Acquisition Regulation when contracting for investment management services for trust funds. B-217281-O.M., March 27, 1985. (FN5)

Finally, when the PBGC serves as trustee for a plan its reasonable expenses in administering, preserving or otherwise managing the plan for the benefit of the participants or beneficiaries are properly chargeable

to trust assets. We have been advised by a PBGC official that any recoveries achieved through the litigation in question would accrue to the benefit of the trust funds and not to the direct benefit of the United States. (FN6) Thus, PBGC's use of a portion of the recovery to pay for professional services employed to recover those assets on behalf of the participant and beneficiaries would not violate the deposit requirements set forth in 31 U.S.C. § 3702 (b). (FN7) See 62 Comp.Gen. 251-52 (1982).

Consequently, we are unaware of any legal requirements or public policy considerations which would serve to preclude the PBGC when serving as trustee for a terminated plan from employing professional services such as attorneys on a contingent fee basis.

Milton J. Socolar

Comptroller General of the United States

FN1 Wisconsin Steel had been a wholly-owned division of IH until July 31, 1977. Effective that date, IH sold Wisconsin Steel to a subsidiary of Envirodyne for \$65,000,000 and the assumption of all liabilities, including unfunded pension liabilities. As of that date, the portion of the unfunded pension liabilities guaranteed by PBGC totalled approximately \$65,000,000. On March 31, 1980, Wisconsin Steel filed for bankruptcy. The PBGC was appointed interim trustee of the Wisconsin Steel pension plans on December 14, 1982, and has been paying the beneficiaries their statutory benefits since that time. If the PBGC prevails in the litigation against IH, trust funds could recover in excess of \$100 million.

FN2 We are advised that since it retained outside counsel in October 1984 and through March 1986, PBGC has paid the firm approximately \$1,250,000, plus expenses. Monthly bills have ranged from a low of \$51,129.69 to a high of \$114,943.94. PBGC anticipates that under the current fee arrangement, it will continue to pay outside counsel at least \$60,000 per month, with higher fees expected closer to and during trial.

FN3 We have been informally advised by an official of the PBGC that the current contract contains a ceiling on costs and fees which may be incurred during the year. Once the ceiling is reached, PBGC approval is required before outside counsel can incur additional costs or earn additional fees.

A similar limitation would be included in the modified contract.

*32691 FN4 This power is distinct from PBGC's authority generally to employ attorneys. 29 U.S.C. § 1302(b)(6).

FN5 Compare B-211149, December 12, 1985.

FN6 Of course, to the extent these recoveries are available to liquidate trust liability to participants and beneficiaries, the PBGC's liability to

participants and beneficiaries for guaranteed benefits insured by the PBGC would be reduced.

FN7 This provision requires each official or agent of the Government who receives money for the use of the United States to deposit the money to the credit of the Treasury without any deductions on account of salaries, fees, costs, charges, expenses or claims of any description whatever. Once deposited, these funds may not be spent except pursuant to an appropriation made by the Congress.